

**IN THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT
MACOUPIN COUNTY, ILLINOIS**

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LISA MADIGAN, Attorney
General of the State of Illinois

Plaintiff,

v.

FRAGRANT 40, LLC, an Illinois
limited liability corporation

Defendant.

No. 11-CH-137

NOTICE OF FILING

PLEASE TAKE NOTICE that I have today filed with the Macoupin County Circuit Clerk a copy of Defendant's **ENTRY OF APPEARANCE** and **ANSWER AND AFFIRMATIVE DEFENSES**, copies of which are herewith served upon you.

Respectfully submitted,

FRAGRANT 40, LLC, Defendant,

By: 

One of Its Attorneys

BROWN, HAY & STEPHENS, LLP

Claire A. Manning, Registration No. 3124724

Peter E. Naylor, Registration No. 6286944

Kelly M. Greco

205 S. Fifth Street, Suite 700

P.O. Box 2459

Springfield, IL 62705-2459

(217) 544-8491

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that service of the foregoing **ENTRY OF APPEARANCE** and **ANSWER AND AFFIRMATIVE DEFENSES** were made by mailing a true and correct copy thereof in a sealed envelope, postage fully prepaid and addressed to:

Ms. Jane McBride
Illinois Attorney General's Office
500 South Second Street
Springfield, IL 62706

by placing same in the United States Mail on this 18 day of November, 2011.

A handwritten signature in black ink, appearing to be "C. Manning", written over a horizontal line.

BROWN, HAY & STEPHENS, LLP

Claire A. Manning, Registration No. 3124724

Peter E. Naylor, Registration No. 6286944

Kelly M. Greco

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FRAGRANT 40, LLC, an Illinois
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No. 11-CH-137

ENTRY OF APPEARANCE

NOW COMES Claire A. Manning, Peter E. Naylor and Kelly M. Greco, of the law firm
of Brown, Hay & Stephens, LLP, and hereby enters their appearance on behalf of Defendant,
FRAGRANT 40, LLC.

Respectfully submitted,

FRAGRANT 40, LLC, Defendant,

By: 

One of Its Attorneys

BROWN, HAY & STEPHENS, LLP

Claire A. Manning, Registration No. 3124724

Peter E. Naylor, Registration No. 6286944

Kelly M. Greco

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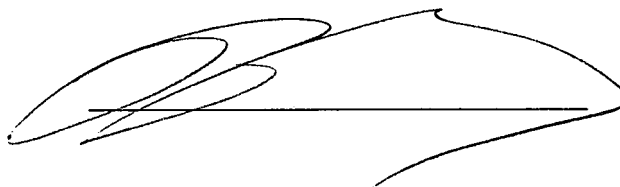
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Ms. Jane McBride
Illinois Attorney General's Office
500 South Second Street
Springfield, IL 62706

by placing same in the United States Mail on this 15 day of November, 2011.

A handwritten signature in dark ink, appearing to be "P. E. Naylor", written over a horizontal line.

BROWN, HAY & STEPHENS, LLP
Claire A. Manning, Registration No. 3124724
Peter E. Naylor, Registration No. 6286944
Kelly M. Greco
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ex rel. LISA MADIGAN, Attorney)
General of the State of Illinois)
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Plaintiff,)
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v.)
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FRAGRANT 40, LLC, an Illinois)
limited liability corporation)
)
Defendant.)

No. 11-CH-137

ANSWER AND AFFIRMATIVE DEFENSES

COUNT I
Water Pollution

NOW COMES Defendant, FRAGRANT 40, LLC, by and through its attorneys, Brown, Hay & Stephens, LLP, and for its answer to the Complaint filed by the Plaintiff, states as follows:

1. This Count is brought on behalf of the People of the State of Illinois, by Lisa Madigan, Attorney General of the State of Illinois, on her own motion and at the request of the Illinois Environmental Protection Agency ("Illinois EPA") pursuant to Sections 42(d) and (e) of the Illinois Environmental Protection Act (the "Act"), 415 ILCS 5/42(d) and (e).

RESPONSE: Defendant generally admits the allegations contained in Paragraph 1, Count I.

2. The Illinois EPA is an agency of the State of Illinois created by the General Assembly in Section 4 of the Act, 415 ILCS 5/4, and which is charged, inter alia, with the duty of enforcing the Act.

RESPONSE: Defendant generally admits the allegations contained in Paragraph 2, Count I.

3. Defendant Fragrant 40, LLC ("Fragrant 40"), is and was at all times relevant to this Complaint in the business of swine production. The operation is a 4,500 head swine finishing operation with shallow manure pits underneath the buildings. There is a two stage lagoon system on site, consisting of a primary cell and secondary cell. It is estimated that each of the two cells has a capacity of approximately 5 million gallons. The Fragrant 40 swine facility is located southwest of Palmyra in the SE 1/4 of Section 8, T11 N, R9W of the 3rd P.M. in Macoupin County, Illinois. The address of the facility is 1682 Barr Road, Greenfield, IL 62044 (the

"facility" or "site"). The registered agent for Fragrant 40, LLC is Ronald Seabaugh, 4239 Woodfield Place, Belleville, IL 62226. At all times relevant to this Complaint, Jeff Seabaugh, Ronald's brother, has been the operator and manager of the facility.

RESPONSE: Defendant generally admits the allegations contained in Paragraph 3, Count I, except for the assertion of lagoon capacity.

4. The facility was purchased in a condition requiring repair. It was originally built in 1968. The primary and secondary lagoon cells were full at the time of purchase, as were the building manure storage pits. When the facility came under control of the current operator in 2008, the operator indicated his intent to close out the second cell of the lagoon system. There is a gravity pipe between the two cells, with a valve. The primary cell's lowest point is at approximately the center of the berm it shares with the secondary cell. The secondary cell has not been closed out. No significant modification has been conducted at the site such that would trigger oversight by the Illinois Department of Agriculture pursuant to its jurisdiction under the Illinois Livestock Management Facilities Act, 510 ILCS 77/1 *et seq.*

RESPONSE: Defendant generally admits some of the allegations contained in Paragraph 4, Count I, but specifically denies the following: (a) Respondent did not cause significant repairs to the facility; (b) Respondent intended to close out the second cell (which serves a positive purpose in containing wastewater); (c) the facility was originally built in 1968; and (d) the lagoons were full at time of Respondent's purchase.

5. The facility has a limited number of acres suitable for the land application of waste from the lagoon system under its sole control. Additionally, the facility has verbal agreements with two local farmers who allow the facility to land apply waste on 380 acres and an additional 600 acres. The facility applies manure according to the specifications provided by the crop farmer. The manure is land applied by using a tractor wagon and knifed in, by an umbilical hose or by a reel gun.

RESPONSE: Defendant generally denies the allegations contained in Paragraph 5, Count I, especially any assertion or allegation that manure is not applied in accordance with all relevant rules and regulations.

6. The Fragrant 40 facility has a total of seven confinement buildings on site. They are tunnel ventilation buildings. Two of the buildings have remained empty. All of the buildings have pits and slatted floors. There is a fresh water pond on the north portion of the site, which collects clean storm water.

RESPONSE: Defendant generally admits the allegations contained in Paragraph 6, Count I, except for the number of buildings, active and inactive, and that the buildings are solely "tunnel ventilation" buildings.

7. The facility's seven confinement buildings are aligned with east-to-west configurations on the eastern portion of the production area. The primary lagoon cell is located

immediately west of the confinement buildings. The secondary cell is located immediately west of and shares a common berm with the primary cell. Swine have been confined in five of the seven buildings under the current ownership ("active buildings").

RESPONSE: Defendant admits the allegations contained in Paragraph 7, Count I as to location, but denies the allegations as to number of buildings and that the primary and secondary cell share a "common berm" separating the two lagoons.

8. Active Building 1 is the southernmost building. Active Building 2 is the second building from the south. The next two buildings progressing north are inactive. Active Building 3 is the third building from the south. Active Building 4 is the second building from the north and Active Building 5 is the northernmost building. Active Buildings 1 through 4 are finishing buildings. Active Building 5 is a former nursery that has been used to house weaner pigs when initially brought on site prior to placement in Active Buildings 1 through 4.

RESPONSE: Defendant generally admits the allegations contained in Paragraph 8, Count I.

9. Active Buildings 3 and 4 have two manure pits each that are connected to an outdoor manure reception pit with a common pipe which, provided blockages within the pipe do not occur, equalizes the manure levels in all four pits. Active Building 5 has one full pit which is pumped via a manually activated pump into one of the manure pits in Active Building 4. Active Building 2 has three manure pits that are interconnected with a common pipe which, provided blockages within the pipe do not occur, equalizes the manure levels in all three pits. The manure pits in Active Building 2 are pumped via a manually activated pump into one of the manure pits in Active Building 3. The manure reception pit is pumped via a manually activated pump to the primary cell. Active Building 1 has three manure pits which are not interconnected and are pumped via a manually activated pump into one of the manure pits in Active Building 3.

RESPONSE: Defendant generally admits the allegations contained in Paragraph 9, Count I.

10. Since purchasing the facility in 2008, the current operators have had a difficult time maintaining sufficient available freeboard in the two lagoon cells and the building pits at the facility. This is at least partially due to the fact the operators have sole control of an insufficient amount of land upon which to land apply waste from the lagoon cells. With regard to the building pits, the Illinois EPA inspector identified multiple locations at the bases of the buildings that are open, exposing the pits under the buildings to precipitation and increasing the levels of waste within the pits which resulted in additional contaminated liquid in the pits that the facility must manage.

RESPONSE: Defendant denies the allegations contained in Paragraph 10, Count I and demands strict proof thereof.

11. During inspections in the spring of 2010, inspectors observed evidence that the building pits were overflowing into drainage pathways between the buildings. These conditions are the result of the fact that all pits under the buildings have consistently been full. The waste

handling system in operation at the facility calls for the pits to be pumped to the primary lagoon cell, however, from the time of purchase until August 2010, the primary lagoon cell had very little freeboard, which meant it had no capacity to receive waste from the building pits.

RESPONSE: Defendant admits that an inspection occurred in the spring of 2010 and that some manure was observed between the buildings; Respondent denies the further allegations contained in Paragraph 11, Count I, and demands strict proof thereof.

12. There is a drainage ditch west of the buildings that runs south to north and drains into the storm water pond. There is a drainage ditch east of the buildings that flows south to north and drains into a stand pipe that outlets to the storm water pond. Drainage between the buildings flows into these ditches that flow into the fresh water pond at the facility. Any contaminated liquid coming from the buildings drains to the fresh water pond.

RESPONSE: Defendant generally admits the allegations contained in Paragraph 12, Count I, but denies that there has been any contamination from the facility of any relevant water body and demands strict proof thereof.

13. The facility is in the watershed of Taylor Creek, a water of the State, which flows north of the facility and into Macoupin Creek that flows into the Illinois River. The west end of the facility's lagoons are approximately 300 feet from Taylor Creek.

RESPONSE: Defendant generally denies the allegations contained in Paragraph 13, Count I, and affirmatively states that the Illinois River is approximately 60 miles from the facility and the Macoupin Creek is approximately 5 miles.

14. Section 3.165 of the Act, 415 ILCS 5/3.165, contains the following definition: "CONTAMINANT" is any solid, liquid, or gaseous matter, any odor or any form of energy, from whatever source.

RESPONSE: Defendant admits that Paragraph 14, Count I cites statutory language.

15. Section 3.545 of the Act, 415 ILCS 5/3.545, contains the following definition: "WATER POLLUTION" is such alteration of the physical, thermal, chemical, biological, or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such water harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.

RESPONSE: Defendant admits that Paragraph 15, Count I cites statutory language.

16. Section 3.550 of the Act, 415 ILCS 5/3.550, contains the following definition: "WATERS" means all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State.

RESPONSE: Defendant admits that Paragraph 16, Count I cites statutory language.

17. Section 12(a) of the Act, 415 ILCS 5/12(a), provides, in pertinent part, as follows:
No person shall:

- a. Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act;

RESPONSE: Defendant admits that Paragraph 17, Count I cites statutory language.

18. Section 506.204(g)(4) of regulations promulgated under the Illinois Livestock Facilities Management Act, 35 III. Adm. Code 506.204 (g) (4), requires that two (2) foot of freeboard be maintained in livestock waste lagoons, as provided in pertinent part as follows:

- 4) In addition to the lagoon's total design volume, a freeboard shall be provided as follows:
 - A) For lagoons service a livestock management facility with a maximum design capacity of less than 300 animal units and not collecting runoff from areas of than the exposed surface of the lagoon (including associated interior berm slopes and flat berm top areas), the top of the settled embankment shall be not less than 1 foot above the fluid surface level of the lagoon total design volume, or
 - 8) For all other lagoons, the top of the settled embankment shall be not less than 2 feet above the fluid surface level of the lagoon total design volume.

RESPONSE: Defendant admits that Paragraph 18, Count I cites regulatory language.

19. Section 18 of the Illinois livestock Management Facilities Act, 510 ILCS 77/18, and Part 580 of regulations promulgated under both the Illinois livestock Management Facilities Act and Illinois Environmental Protection Act, 35 III. Adm. Code Part 580, requires that operators report any release of livestock waste of 25 gallons or more within 24 hours, and provides in pertinent part:

Section 18 (510 ILCS 77/18) Reporting release of waste

- (a) An owner or operator of a livestock waste handling facility shall report to the Agency any release of livestock waste from a livestock waste handling facility or from the transport of livestock waste within 24 hours after discovery of the

release. Reporting shall not be required in the case of a release of less than 25 gallons that is not released to the waters of the State or from a controlled and recovered release during field application ...

Section 580.105 (35111. Adm. Code 580.105) Method of Reporting a Release

- a) An owner or operator of a livestock waste lagoon shall report any release of livestock waste from the livestock waste handling facility or from the transport of livestock waste by means of transportation equipment within 24 hours after the discovery of the release. Reports of releases to surface waters, including to sinkholes, drain inlets, broken subsurface drains or other conduits to groundwater or surface waters, shall be made upon discovery of the release, except when such immediate notification will impeded the owner's or operator's response to correct the cause of the release or to contain the livestock waste, in which case the report shall be made as soon as possible but no later than 24 hours after discovery.
- b) Reporting shall not be required in the case of a release of less than 25 gallons that is not released to the waters of the State or from a controlled and recovered release during field application.

RESPONSE: Defendant admits that Paragraph 19, Count I cites regulatory language.

20. On November 2, 2009, the Illinois EPA conducted an inspection of the facility in response to citizen complaints. At the time of the November 2, 2009 inspection, the Illinois EPA inspector observed turbid reddish-orange liquid overtopping the facility's secondary livestock waste lagoon cell's west berm at several locations. The liquid had a swine waste odor. The inspector observed the discharge to flow into the east ditch of White Oak Road, a distance of approximately 20 yards. The road ditch flowed approximately 100 yards north where it entered Taylor Creek. At the time of the inspection, facility employees were pumping waste from the secondary cell to the primary lagoon cell, to lower the contents of the secondary cell and thus stop the cell from discharging. Water samples collected from the east ditch of White Oak Road approximately 80 yards upstream of the confluence of Taylor Creek were turbid with a reddish orange color. Water samples collected at the confluence of the ditch and Taylor Creek were turbid with a reddish-orange color.

RESPONSE: Defendant admits the allegation contained in Paragraph 20, Count I that the IEPA conducted an inspection on November 2, 2009, as a result of a complaint by Joe and/or Megan Clark (the "Clarks"), but denies the factual and legal allegations asserted and demands strict proof thereof.

21. On November 18, 2009, the Illinois EPA conducted an inspection at the facility in response to citizen complaints. At the time of the inspection, the Illinois EPA inspector observed a turbid, reddish-orange liquid overtopping the secondary lagoon cell's west berm at several locations. The livestock waste was discharging from the secondary lagoon cell's west berm to the east ditch of White Oak Road and entered Taylor Creek at the confluence of the road ditch and Taylor Creek. At the time of the inspection, there was 1 inch of freeboard in the primary lagoon.

Water samples collected from the east ditch of White Oak Road approximately 80 yards upstream of the confluence of Taylor Creek were turbid with a reddish-orange color. Water samples collected at the confluence of the ditch and Taylor Creek were turbid.

RESPONSE: Defendant admits the allegation contained in Paragraph 21, Count I that the IEPA conducted an inspection on November 18, 2009, as a result of a complaint by the Clarks, but denies the factual and legal allegations asserted and demands strict proof thereof.

22. On November 23, 2009, the Illinois EPA conducted an inspection at the facility in response to citizen complaints. At the time of the inspection, the Illinois EPA inspector observed a moderately heavy flow of turbid liquid in the south road ditch of Barr Road along the northern border of the facility's land application field. The inspector observed that the flow volume appeared to be abnormally high given the weather and ground conditions at the time.

RESPONSE: Defendant admits the allegation in Paragraph 22, Count I that the IEPA conducted an inspection on November 23, 2009, as a result of a complaint by the Clarks, but denies the factual and legal allegations asserted and demands strict proof thereof.

23. Jeff Seabaugh, the facility operator, indicated that at approximately 5:00 A.M. on November 23, 2009, there had been a blowout in the hose located between the facility lagoon and the land application equipment reel cart. The blowout occurred when Mr. Seabaugh was visually inspecting the land application system and he was covered with livestock waste. In response to the blowout, Mr. Seabaugh shut down the lagoon pump. The blowout occurred at a location near two tile risers in the northeast corner of the land application field. A large volume of rain water was pooled at the tile risers. Livestock waste from the damaged hose entered the pooled storm water. Mr. Seabaugh indicated that the two tile risers in the harvested soybean field are connected to one tile that discharges in the south ditch of Barr Road near the east driveway entrance of the facility.

RESPONSE: Defendant generally admits the factual allegations contained in Paragraph 23, Count I, but denies any alleged violation.

24. At the time of the November 23, 2009 discharge, the facility did not have equipment available that would have allowed them to recover the discharged waste from the road ditch. The Illinois EPA inspector followed the turbid liquid discharging from the tile to the south ditch of Barr Road approximately 200 yards to the west where the liquid traveled through a culvert to the north ditch of Barr Road near the facility's west driveway entrance and entered an unnamed tributary to Taylor Creek. The unnamed tributary heads in a northwest direction from the culvert on Barr Road and then passes through a culvert on White Oak Road located southwest of the secondary lagoon cell and then reaches Taylor Creek. The distance from the headwaters of the unnamed tributary at the culvert on Barr Road and Taylor Creek is approximately 300 yards. The unnamed tributary was observed at the culvert on White Oak Road located southwest to the secondary lagoon cell. Turbid liquid was observed flowing through the culvert. The confluence of the unnamed tributary and Taylor Creek was observed. Turbid liquid was observed entering Taylor Creek from the unnamed tributary. Water samples collected from the south ditch of Barr Road was turbid with a reddish-orange color. Water samples collected from the unnamed tributary

to Taylor Creek, approximately 10 yards upstream of its confluence with Taylor Creek was turbid.

RESPONSE: Defendant admits the factual allegations contained in Paragraph 24, Count I concerning geography and location, but denies any legal conclusions contained therein. Defendant affirmatively states that the water samples taken were observed to be free of odor and unlawful contamination.

25. At the time of the November 23, 2009 inspection, the facility's primary lagoon cells was observed to have approximately 1 to 2 inches of freeboard. The secondary lagoon cell had approximately 8 inches of freeboard.

RESPONSE: Defendant denies the underlying factual assertions contained in Paragraph 25, Count I.

26. At the time of the November 2, November 18 and November 23, 2009 inspections, the Illinois EPA inspector advised Jeff Seabaugh of the requirement to report releases of livestock waste within 24 hours of the release and of the need for him to do so. Mr. Seabaugh failed to report the November 2 and November 18 releases. He reported the November 23, 2009 release on November 28, 2009.

RESPONSE: Defendant denies the factual allegations contained in Paragraph 26, Count I, and affirmatively states that Mr. Seabaugh began reporting releases of livestock waste once the IEPA inspectors told him to do so and provided the required forms.

27. On December 24, 2009, the Illinois EPA conducted an inspection of the facility in response to a citizen complaint. At the time of the inspection, the secondary lagoon cell had approximately 4 to 6 inches of available freeboard, and the primary cell had 1 to 2 inches of available freeboard. At the time of the inspection, the Illinois EPA inspector observed a hose and wood trough discharging liquid manure from Active Building 1 to the primary lagoon cell. The Illinois EPA inspector questioned why more waste was being pumped into the primary cell given the lack of available freeboard.

RESPONSE: Defendant generally admits the allegation contained in Paragraph 27, Count I that the IEPA conducted an inspection on December 24, 2009, as a result of a complaint by the Clarks, but denies the factual and legal allegations asserted and demands strict proof thereof.

28. At the time of the December 24, 2009 inspection, facility employees indicated that the facility had not land applied waste from the cells since late November. They were scheduled to land apply waste the week of December 28, 2009.

RESPONSE: Defendant denies the underlying factual allegations contained in Paragraph 28, Count I.

29. At the time of the December 24, 2009 inspection, the Illinois EPA inspector reviewed the operation of the facility in an attempt to determine why the building pits filled so

rapidly. The inspector observed that damaged manure pit fan ventilation boxes and damaged manure pit pump-out ports existed at the buildings and were serving as potential conduits for clean storm water to be entering the building manure storage pits. Once clean water enters the pits, it becomes contaminated due to contact with the stored manure and reduces the amount of storage capacity in the pits. The Illinois EPA inspector told facility employees and Jeff Seabaugh that temporary measures should be installed immediately, such as covering the manure pit fan ventilation boxes with plywood and installing small earthen berms and covering the constructed berms at the damaged manure pit pump-out ports until weather allowed for more permanent measures to be installed. The Illinois EPA inspector had advised Mr. Seabaugh of the need to prevent stormwater access into the pits on multiple occasions in the past.

RESPONSE: Defendant admits that the IEPA inspector and Jeff Seabaugh discussed the facility as set forth in Paragraph 29, Count I, but denies the alleged legal and factual assertions contained therein.

30. On January 20, 2010, the Illinois EPA inspector contacted Jeff Seabaugh in response to a citizen complaint. Mr. Seabaugh indicated that the facility was depopulated and would remain unpopulated until February 1, 2010. The facility was in the process of land applying livestock waste. Mr. Seabaugh informed the inspector that they also previously land applied on frozen ground for two days.

RESPONSE: Defendant admits the allegation in Paragraph 30, Count I that Mr. Seabaugh had a communication with an IEPA inspector on or about January 20, 2010, but denies the factual and legal allegations asserted and demands strict proof thereof.

31. At the time of the January 20, 2010 interview with the operator, the operator indicated that the center manure pit of Active Building 1 had been observed to fill more rapidly than the other pits in the building. A damaged, shallow field tile was suspected to be causing the rapid filling. The operator expected to be able to investigate the cause of the infiltration when conditions allowed in the summer of 2010.

RESPONSE: Defendant admits the allegation in Paragraph 31, Count I that Mr. Seabaugh had a communication with an IEPA inspector on or about January 20, 2010, but denies the factual and legal allegations asserted and demands strict proof thereof.

32. On January 22, 2010, the Illinois EPA conducted a reconnaissance inspection at the facility. The primary lagoon cells had approximately three inches of freeboard and was covered with ice and the secondary cell had approximately six inches of freeboard and was ice covered. The most recently used application field was observed by the Illinois EPA inspector. Pooled liquid was observed on the surface of the field. There was no evidence of runoff leaving the application field.

RESPONSE: Defendant generally admits the allegation contained in Paragraph 32, Count I that the IEPA conducted an inspection on January 22, 2010, but denies the factual and legal allegations asserted and demand strict proof thereof.

33. At the time of the January 22, 2010 inspection, the Illinois EPA inspector observed manure was being pumped from confinement Active Building 3 into the primary cell. A hose was observed near the building that discharged into a section of irrigation pipe which discharged into the primary cell. In the course of the inspection, the Illinois EPA inspector observed that the hose and section of irrigation pipe used to pump manure was allowing manure to flow back toward the building. The operator investigated and determined the pump had just become plugged, causing back-flowing from the pipe. The volume of liquid discharged was below the quantity required to be reported. The operator explained that this manner of pumping was being utilized because the pipe draining the building's pit to the reception pit was apparently plugged. The facility had been unsuccessful in its attempts to unplug the pipe.

RESPONSE: Defendant generally admits the allegations contained in Paragraph 33, Count I, except any assertion that the operation cannot or did not "unplug" the pipe and further and affirmative states that there was no unlawful discharge of manure.

34. At the time of the January 22, 2010 inspection, a pool of liquid swine manure was observed along the west wall of the manure pit associated with Active Building 3. It appeared as though a crack in the manure pit wall or in a concrete block mortar joint was allowing the liquid manure to exit the pit. At the time of the inspection, the operator could not definitively determine the cause of the release. He indicated that once he got the pit pumped down, he would observe the pit wall to determine the cause of the pooled liquid.

RESPONSE: Defendant generally admits the allegations contained in Paragraph 34, Count I, and affirmative states that there was no unlawful discharge of manure.

35. At the time of the January 22, 2010 inspection, the Illinois EPA inspector observed that the facility has installed temporary measures at damaged manure pit fan ventilation boxes and at most other locations where surface runoff had the potential to enter the manure pits associated with the facility's confinement buildings. There remained areas where surface water could still get into the pits. At the time of the inspection, the facility operator indicated he was aware of the locations and would make the corrections, and had plans to make permanent repairs and corrections to all locations where surface water has the potential to enter building waste storage pits.

RESPONSE: Defendant admits the first sentence of Paragraph 35, Count I but denies the remaining allegations.

36. At the time of the January 22, 2010 inspection, the operator indicated he spoke with the facility's former owner and learned that a concrete structure located north of Active Building 2 was a cistern that was supplied by a six inch diameter line from a well located near the pump house north of the buildings. Some locations where it appeared that there were damaged manure pit pump-out ports were actually screened inlets to the cistern that were used to allow surface runoff to enter the cistern. Apparently the well and water reservoir could not provide adequate water for the growing pigs during dry periods. The cistern has a line to the hallway near the northwest corner of Active Building 2. The operator indicated his plan was to allow the cistern to remain but permanently cap the inlets. There also existed an open pit pump-out on the north

side of what is considered the facility's future nursery building (Active Building 5). The operator identified this location to be a cistern inlet. He indicated the facility had missed it when they were capping other locations and would now cap it.

RESPONSE: Defendant admits some of the allegations contained in paragraph 36, Count I, and denies others.

37. At the time of the January 22, 2010 inspection, the Illinois EPA inspector discussed the permanent repair/replacement of some of the pump-out ports with the operator, to extend the ports above the top of the manure pit walls so that manure is not discharged from the damaged ports before the manure pits are full. This would allow the entire manure pit volume to be used. The inspector also discussed completing some additional grade work with the operator, to assure that uncontaminated storm water is directed away from the confinement buildings and does not stand near the buildings. The operator agreed to perform this work when the weather was warmer and drier.

RESPONSE: Defendant admits some of the allegations contained in Paragraph 37, Count I, and denies others.

38. At the time of the January 22, 2010 inspection, the manure reception pit located adjacent to Active Building 3 still lacked a cover and fencing to prevent accidental entry into the pit. At the time of the inspection, the operator indicated he was unsure of the arrangement of pipes that drain the manure pits to the reception pit. He indicated he desired to get all of the manure pits to drain to the reception pit to eliminate the above ground pumping lines the facility currently had to use. With regard to Active Building 1, the operator indicated that the manure from the three building manure pits were currently pumped directly to the primary lagoon cell. The operator wants to place a recharge line from the primary cell into Active Building 1 that can be used in any of the three pits to soften and flush the manure as the manure is getting too thick to pump. The facility intends to install three drops per pit so they can flush towards the pumping location that will transfer the flushed manure to the reception pit. The operator indicated that the thick manure may be part of the plugging problem that was experienced in the northwest pit in Active Building 3.

RESPONSE: Defendant admits some of the allegations contained in Paragraph 38, Count I, and denies others.

39. On February 2, 2010, the Illinois EPA sent the facility a Violation Notice concerning the discharges documented on November 2, November 18 and November 23, 2009. The violation notice included a requirement that the facility install freeboard markers in all livestock waste handling and storage structures and that the amount of available freeboard be recorded weekly. The notice also required that the facility cease and desist discharges of livestock waste to waters of the State; apply for and obtain an NPDES permit, which was to include a comprehensive nutrient management plan; secure and maintain adequate land application acreage; maintain adequate capacity and available freeboard in all waste storage pits and lagoon cells and report livestock waste releases. The notice was sent to Jeff Seabaugh at the Fragrant 40 facility by certified mail. A signed receipt was received by the Illinois EPA. On March 12, 2010, Mr. Seabaugh responded to the notice in writing.

RESPONSE: Defendant admits the allegation in Paragraph 39, Count I that the IEPA sent the facility a Violation Notice on February 2, 2010, pursuant to section 31 of the Illinois Environmental Protection Act, which constitutes an *initiation* of an enforcement action. Defendant denies that the violation notice itself constitutes applicable legal requirements, pending adjudication.

40. On February 22, 2010, the Illinois EPA conducted an inspection of the facility in response to a citizen complaint. At the time of the inspection, the Illinois EPA inspector observed the primary lagoon cell to have approximately 8 inches of available freeboard and the secondary lagoon cell had approximately 2 to 3 inches of freeboard. One of the Defendant's employees indicated that, that day, the facility had pumped from the secondary cell to the primary cell for three hours and added 1 inch of freeboard in the secondary cell. Prior to February 22, 2010, the last time the freeboard levels were checked was February 19, 2010. The employee indicated that on that date the primary cell had approximately 2 feet of available freeboard. The three employees on site at the time of the inspection speculated that the rapid loss of freeboard was possibly due to ice melt within the cells, snow melt along the berms that entered the cells, a recent rainfall and possibly frost leaving the ground. The inspector observed no discharges at the time of the inspection. He collected water samples in potential receiving waters.

RESPONSE: Defendant admits some of the allegations contained in Paragraph 40, Count I, and denies others.

41. On March 19, 2010, the Illinois EPA conducted a joint inspection with the U.S. EPA at the facility. At the time of the inspection, the Illinois EPA inspector observed that the primary cell had approximately 2 inches of available freeboard and the secondary cell had approximately 8 inches of available freeboard.

RESPONSE: Defendant admits the allegation contained in Paragraph 41, Count I that the Illinois EPA conducted a joint inspection with the U.S. EPA at the facility on March 19, 2010, but denies the factual allegations asserted and demands strict proof thereof.

42. At the time of the March 19, 2010 inspection, the Illinois EPA inspector observed a blower line pipe (former manure pit ventilation system component) at Active Building 3 that had allowed manure to exit the manure pit when the pit was full at the time of the January 22, 2010 Illinois EPA inspection. At the time of the March 19, 2010 inspection, the blower line pipe had still not been plugged. The Illinois EPA inspector again told Jeff Seabaugh, facility manager, that the pipe needed to be plugged.

RESPONSE: Defendant admits the allegations contained in Paragraph 42, Count I.

43. At the time of the March 19, 2010 inspection, Jeff Seabaugh again discussed his plans to eliminate above ground lines to the primary lagoon cell. He indicated that the unused buildings on site would be razed. A concrete pit will be installed in the southwest corner of the east half of Active Building 3 and manure will be pumped from Active Buildings 1 and 2 to this pit. The manure from Active Building 3 drains into an existing reception pit located near Active

Building 3.

RESPONSE: Defendant admits the allegations contained in Paragraph 43, Count I.

44. On April 14, 2010, the Illinois EPA conducted an inspection at the facility in response to citizen complaints. At the time of the inspection, the Illinois EPA inspector observed that the primary lagoon cell had approximately 1 inch of freeboard available. It appeared that in an area approximately 35 feet south of the northwest corner of the primary cell it had overtopped and discharged into the second cell. A facility employee confirmed that on April 6, 2010, the primary cell overtopped and discharged down the west berm of the primary cell into the secondary cell. There were no discharges out of the lagoon system. At the time of the April 14, 2010 inspection, the Illinois EPA inspector advised the facility to build earthen berms on either side of the location where the overtopping occurred to create a channel to convey and contain any future overtopping between the two cells. The operator was also advised to place a freeboard marker near this channel as this is the lowest point of the primary cell. At the time of the April 14, 2010 inspection, the secondary cell had approximately 10 inches of freeboard available.

RESPONSE: Defendant generally admits the allegations contained in Paragraph 44, Count I, but denies any legal conclusions and consequences contained therein.

45. At the time of the April 14, 2010 inspection, between 4,400 and 4,500 head of swine over 120 pounds were being confined at the facility. The pit associated with Active Building 2 was full. The facility intended to land apply from the primary cell, and then pump the Active Building 2 pit into the primary lagoon cell. On April 18, 2010, the facility started to land apply from the primary lagoon cell.

RESPONSE: Defendant generally denies the allegations contained in Paragraph 45, Count I, except that the facility intended to land apply from the primary cell, and then pump the Active Building 2 pit into the primary lagoon cell and that, on April 18, 2010, the facility started to land apply from the primary lagoon cell.

46. On April 20, 2010, Jeff Seabaugh informed the Illinois EPA that land application had been conducted continuously since the evening of April 18, 2010 and that at the time of his call to the agency, 30 inches of available freeboard in the primary lagoon cell. Mr. Seabaugh reported that all of the facility confinement building pits had been pumped into the primary lagoon cell.

RESPONSE: Defendant generally admits the allegations contained in Paragraph 46, Count I.

47. On April 23, 2010, the Illinois EPA conducted an inspection of the facility's land application field. At the time of the inspection, Jeff Seabaugh told the inspector that analysis results for samples taken from the secondary lagoon cell showed low nitrate levels. The facility was going to begin to use the secondary cell to provide water for the pigs to drink and to flush manure pits. At the time of the April 23, 2010 inspection, the Illinois EPA inspector observed that there was 5 feet of freeboard available in the primary lagoon cell, and approximately 10 to 12 inches of available freeboard in the secondary cell.

RESPONSE: Defendant generally admits the allegations contained in Paragraph 47, Count I.

48. At the time of the April 23, 2010 inspection, Jeff Seabaugh told the Illinois EPA inspector that the storm water run-in repairs at the former pit fan ventilation boxes and the cistern at the buildings were to begin the following week. The Illinois EPA had repeatedly pointed out the need for these repairs since the time of the December 24, 2009 and at that time noted that Mr. Seabaugh had previously, repeatedly been advised of the need for such repairs.

RESPONSE: Defendant admits the allegation contained in Paragraph 48, Count I that Mr. Seabaugh told the IEPA inspector that the storm water run-in repairs at the former pit fan ventilation boxes and the cistern at the buildings were to begin the following week. Defendant denies that the IEPA had repeatedly pointed out the need for repairs and that Mr. Seabaugh had previously and repeatedly been advised of the need for such repairs.

49. On June 24, 2010, the Illinois EPA conducted an inspection of the facility to observe the status of repairs to prevent storm water run-in to the building pits as well as to check on the available freeboard in the lagoon cells. At the time of the inspection, Ron Seabaugh informed the Illinois EPA inspector that between 1.7 and 1.8 million gallons were land applied from the primary cell the past spring.

RESPONSE: Defendant generally admits the allegations contained in Paragraph 49, Count I, but denies that repairs were needed to prevent storm water run-in to the building pits.

50. At the time of the June 24, 2010 inspection, the primary cell had approximately 12 inches of available freeboard. The secondary cell had approximately 6 inches of available freeboard. Ron Seabaugh told the Illinois EPA inspector that they pump from the secondary cell to the primary cell as needed.

RESPONSE: Defendant generally admits the allegations contained in Paragraph 50, Count I as the observations of the IEPA inspector, and affirmatively states that there was no evidence of a discharge.

51. At the time of the June 24, 2010 inspection, the berms of the lagoons were in need of mowing and freeboard markers had not been installed in the primary and secondary lagoon cells.

RESPONSE: Defendant generally admits the allegations contained in Paragraph 51, Count I, but denies any legal conclusions or consequences contained therein.

52. At the time of the June 24, 2010 inspection, the Illinois EPA inspector advised Ron Seabaugh that he should, at that time, be looking for and acquiring access to additional land application ground, such as pasture, hay field or wheat fields that would be harvested within the next month rather than waiting until both of the cells and the manure pits were full. Mr. Seabaugh

indicated that they had looked and were unable to identify additional ground. The facility had recently received 4 inches of rain.

RESPONSE: Defendant generally admits the allegations contained in Paragraph 52, Count I, but denies any legal conclusions or consequences contained therein.

53. At the time of the June 24, 2010 inspection, the Illinois EPA inspector again advised Ron Seabaugh to install an earthen berm from the northwest corner of the primary cell down to the northeast corner of the secondary cell to assure that if the primary cell overtops, the discharging liquid will be directed into the secondary cell.

RESPONSE: Defendant generally admits the allegations contained in Paragraph 53, Count I that there was a general discussion concerning an earthen berm, but denies any legal conclusions or consequences contained therein.

54. At the time of the June 24, 2010 inspection, the former ventilation boxes that had been a location that allowed storm water run-in to the building pits, were observed. New concrete blocks have been placed and the holes in the blocks had been filled with mortar. The overflow elevations of the repaired boxes were installed at elevations such that manure will backup into the slats within the buildings before exiting the boxes. The repaired boxes were installed at elevations above the surrounding grade to prevent surface runoff from entering the boxes. Metal covers had been constructed and installed to prevent storm water from entering the boxes. All but one of the former ventilation fan boxes had been repaired in this manner. The remaining box was located at the northwest corner of Active Building 5 which was not currently in use. The box needed some additional sheet metal installed to prevent precipitation from entering the ventilation fan box opening.

RESPONSE: Defendant generally admits the allegations contained in Paragraph 54, Count I, except that the box needed additional sheet metal installed to prevent precipitation from entering the ventilation fan box opening.

55. At the time of the June 24, 2010 inspection, most of the manure pit pump-out ports were observed to be covered with caps and/or extended and covered with caps or buckets to prevent surface runoff and precipitation from entering the ports. Not all of the manure pit pump-pit ports that needed work had been repaired or capped/covered. At the time of the June 24, 2010 inspection, the Illinois EPA inspector advised the Seabaughs to get all of the ports extended about the level of the slats over the manure pits and covered.

RESPONSE: Defendant generally admits the allegations contained in Paragraph 55, Count I, but denies a legal requirement to cover the manure pit pump-out ports and denies that the manure pit pump-out ports needed repair.

56. At the time of the June 24, 2010 inspection, the cistern inlet located between Active Building 3 and Active Building 4 was observed to have been backfilled with soil. A surface inlet associated with the cistern located north of Active Building 5 did not have a cover or cap. The Seabaughs indicated that this was an oversight and that they would get this inlet capped or backfilled to prevent surface runoff and/or precipitation from entering the inlet.

RESPONSE: Defendant generally admits the allegations contained in Paragraph 56, Count I.

57. Another source of potential clean water infiltration are the former gooseneck manure pit ventilation system pipes. The ventilation system has not been in use at the facility for a number of year and had fallen into disrepair. Portions of the system had been repaired. At the time of the June 24, 2010 inspection, some of the system continued to need capping, plugging or elimination of pipes.

RESPONSE: Defendant denies the allegations contained in Paragraph 57, Count I.

58. At the conclusion of the June 24, 2010 inspection, the Illinois EPA inspector told the Seabaughs that the biggest concern he observed was the limited freeboard available within both lagoon cells. He advised that the Illinois EPA recommends that a minimum of 2 feet of available freeboard be maintained at all times. The Illinois EPA inspector again advised that the Seabaughs needed to acquire access to additional land application ground.

RESPONSE: Defendant admits the allegations contained in Paragraph 58, Count I.

59. On July 27, 2010, the Illinois EPA conducted an inspection of the facility. At the time of the inspection, there were between 2,500 and 2,800 head of swine at the facility. These animals were scheduled to be shipped soon.

RESPONSE: Defendant admits the allegations contained in Paragraph 59, Count I.

60. At the time of the July 27, 2010 inspection, the second cell had 12 inches of available freeboard. The primary lagoon cell was observed to have 6 to 8 inches of available freeboard.

RESPONSE: Defendant admits that the allegations contained in Paragraph 60, Count I were the observations of the IEPA inspector.

61. At the time of the July 27, 2010 inspection, it was apparent a pipe had been installed from the secondary cell to facilitate use of the secondary cell contents as drinking water for the pigs. At the time of the July 27, 2010 inspection, it was apparent soil had been added to the northwest corner of the primary cell and continued south along the common berm between the cells to direct potential discharges from the northwest corner of the primary cell into the secondary cell. A trench containing a white PVC pipe was observed on the east berm of the primary cell. It appeared that this pipeline would be used to provide water into Active Building 3 to flush the manure pit and help loosen manure solids in the manure pit.

RESPONSE: Defendant admits the allegations contained in Paragraph 61, Count I.

62. At the time of the July 27, 2010 inspection, facility employees informed the Illinois EPA inspector that work to extend the manure pump-put ports was planned for the following day.

RESPONSE: Defendant admits the allegations contained in Paragraph 62, Count I.

63. As of July 27, 2010, the facility had repaired former ventilation fan boxes to keep them from allowing surface water into the pits, except for the ventilation box at Active Building 5, covered the reception pit with a roof and extended and repaired some of the manure pit pump-out ports to divert and prevent surface runoff from entering building pits. The surface inlets associated with the former cistern system had been backfilled and/or repaired to prevent surface runoff from entering the cistern system. Pipelines had been installed to pump liquid from the primary cell to flush the manure pits within the confinement buildings. New permanent pipelines had been installed, mostly underground, to eliminate the need for above-ground, temporary lines and hoses that are more readily damaged and can result in leakage or releases of livestock waste.

RESPONSE: Defendant admits the allegations contained in Paragraph 63, Count I.

64. As of July 27, 2010, facility personnel had removed all blockages within the manure pits and the livestock waste handling system. The new flushing operations coupled with removal of the blockages resulted in the free flow of manure within the manure pits and livestock waste handling system providing easier manure transfer when needed rather than relying on temporary pumping system which are more prone to failure. The re-use of liquid from the primary cell eliminated the need to add water to the manure pits' to soften the manure and had reduced the waste volume generated that needs to be stored within the lagoon cells.

RESPONSE: Defendant admits the allegations contained in Paragraph 64, Count I.

65. As of July 27, 2010, the facility planned to sew the seven acre field on the facility property and some of the area to the south of Active Building 1 and the primary lagoon cell in clover to allow liquid from the secondary cell to be irrigated onto the clover ground multiple times each summer after the clover is harvested to provide additional freeboard in the cell.

RESPONSE: Defendant admits the allegations contained in Paragraph 65, Count I.

66. As of July 27, 2010, the facility had lined up sufficient acreage to land apply 1.9 million gallons of waste from the lagoon cells in the fall. Over the years, manure solids had built up in the primary cell. Agitating the primary cell during manure pumping operations has removed some of the solids within the cell and was planned for the fall application as well. The use of a track hoe was planned for the coming fall to be used around the perimeter of the primary cell to remove the manure solids buildup from the cell berm toward the center of the cell as far as the track hoe arm could reach. The solids would be land applied. Once completed, this manure solids removal would provide additional freeboard within the primary cell heading into winter months.

RESPONSE: Defendant admits the allegations contained in Paragraph 66, Count I.

67. On October 28, 2010, the Illinois EPA conducted an inspection of the facility's production area and the land application fields associated with the facility. At the time of the inspection, the primary lagoon cell had 14 inches of available freeboard and the secondary lagoon cell had approximately 26 inches of freeboard. A freeboard marker was not observed in either cell. The facility had not been populated since early August, 2010.

RESPONSE: Defendant admits the allegations contained in Paragraph 67, Count I.

68. At the time of the October 28, 2010 inspection, it was Defendant's intent to land apply 3 million gallons or more from the lagoon cells and empty the confinement building pits into the primary cell. The facility intended to repopulate the facility in January 2011, and they intended to empty the pits prior to repopulating.

RESPONSE: Defendant generally admits the allegations contained in Paragraph 68, Count I, but denies that the Defendant intended to repopulate the facility in January 2011, and intended to completely empty the pits prior to repopulating.

69. At the time of the October 28, 2010 inspection, each of the confinement buildings had at least one, and in general multiple, pit pump-out ports or pit gooseneck ventilation system piping that were yet to be capped, plugged or eliminated to prevent potential precipitation and/or surface runoff from entering the pits. Jeff Seabaugh was advised that these areas needed to be repaired and capped.

RESPONSE: Defendant generally admits the allegations contained in Paragraph 69, Count I, but denies any legal conclusions or consequences contained therein.

70. On December 23, 2010, the Illinois EPA conducted an inspection of the facility. The facility was not populated with swine at the time of the inspection. The primary lagoon cell had approximately 24 inches of freeboard and the secondary lagoon cell had approximately 27 inches of freeboard. A freeboard marker was not observed in either of the lagoon cells.

RESPONSE: Defendant generally admits the allegations contained in Paragraph 70, Count I as the observations of the IEPA inspector, but denies that a freeboard marker was not installed in the lagoon cells.

71. At the time of the December 23, 2010 inspection, each of the five recently active confinement buildings had at least one, and in general multiple, manure pit pump-outports or manure pit ventilation system pipes in need of being repaired/replaced or having caps installed to prevent potential precipitations and/or surface runoff from entering the pits.

RESPONSE: Defendant generally admits the allegations contained in Paragraph 71, Count I, but denies any legal conclusions or consequences contained therein.

72. At the time of the December 23, 2010 inspection, the manure pits associated with the five most recently active confinement buildings were observed to have available freeboard ranging from 2 inches to 12 inches. Thus, Defendants either had not emptied the pits in November and early December as originally intended, or due to clean water infiltration, the pits were filling with wastewater even while the facility was out of production.

RESPONSE: Defendant denies the allegations contained in Paragraph 72, Count I.

73. On March 1, 2011, the Illinois EPA conducted an inspection at the facility in

response to a citizen complaint. At the time of the March 1, 2011 inspection, the facility had yet to be populated with swine.

RESPONSE: Defendant admits the allegations contained in Paragraph 73, Count I.

74. At the time of the March 1, 2011 inspection, the Illinois EPA inspector observed a release of manure from a crack near the northwest corner of the northern manure pit associated with Active Building 3. The inspector observed the discharge to travel approximately eighty-five (85) yards to the north, pass through a culvert under a facility access road and enter the facility's fresh water pond. The freshwater pond has a continuous outfall to an unnamed tributary of Taylor Creek.

RESPONSE: Defendant admits the allegation contained in Paragraph 74, Count I that a small amount of manure was released from a crack near the northwest corner of the northern manure pit associated with Active Building 3, but denies that this constituted a discharge.

75. At the time of the March 1, 2011 inspection, pooled manure was observed near a former pit ventilation pipe in the west wall of one of the manure pits associated with Active Building 4. The Illinois EPA inspector had previously observed a discharge of manure from this location. Subsequently, the pipe has been plugged with concrete. At the time of the inspection, the Illinois EPA inspector observed that it appeared that manure seeping from the plugged pipe in the west wall of Active Building 4 had the potential to reach the channel of manure being released from Active Building 3, and thus contribute to the discharge to the freshwater reservoir.

RESPONSE: Defendant admits the allegation contained in Paragraph 75, Count I that there was a small amount of pooled manure observed near a former pit ventilation pipe in the west wall of one of the manure pits associated with Active Building 4, but denies that this constituted a discharge and denies that this entered a water of the State.

76. At the time of the March 1, 2011 inspection, the Illinois EPA inspector observed that there were no readily identifiable freeboard marker in either cell of the two-stage lagoons. The Illinois EPA inspector estimated that the secondary cell had 22 inches of freeboard and the primary cell had 16 inches of freeboard.

RESPONSE: Defendant admits the allegation contained in Paragraph 76, Count I that the IEPA inspector estimated that the secondary cell had 22 inches of freeboard and the primary cell had 16 inches of freeboard, but denies that there were no freeboard markers in the cell.

77. On July 14, 2011, the Illinois EPA conducted an inspection of the facility in response to a citizen complaint and to check the status of the facility and its livestock waste storage structures.

RESPONSE: Defendant admits the allegations contained in Paragraph 77, Count I.

78. Prior to conducting the inspection, the Illinois EPA inspector called the site manager, Jeff Seabaugh. Mr. Seabaugh informed the inspector that 3000 weaned pigs had been brought to the site and housed in Active Buildings 3 and 4 the previous week. Mr. Seabaugh indicated he had received email correspondence from a neighbor of the facility and, in response to this odor complaint, he was practicing "natural ventilation" of the facility buildings in an attempt to address the odor complaint. He was leaving the large ventilation fans at the west ends of the two buildings off. Side curtains were fully open. Several fans inside or on the sides of the building were on to provide air movement in the building. On hot days, he sprinkled the pigs with water.

RESPONSE: Defendant admits the allegations contained in Paragraph 78, Count I.

79. At the time of the July 14, 2011 inspection, the Illinois EPA inspector observed livestock waste seepage and discharge from the west end of Active Building 4 livestock waste storage pit. The discharge was continuing. The discharge pooled at the west end of the building. The Illinois EPA inspector followed the flow path of the discolored and odorous wastewater north through tall grass and weeds toward the site's fresh water pond. The discharge flowed into a steel pipe culvert under a site access road about 120 feet north of Active Building 4. It discharged from the culvert and flowed through another 60 feet of tall grass discharging into the southwest arm of the site's fresh water pond. The fresh water pond's overflow pipe discharge forms an unnamed tributary which joins Taylor Creek about 250 feet north of the pond. The overflow pipe intake is approximately 330 feet from the southwest arm of the pond where the livestock waste discharge was entering the pond. The pond's surface area is approximately 4.5 acres.

RESPONSE: Defendant admits the allegations contained in Paragraph 79, Count I as the IEPA inspector's observations, but denies that there was an unlawful discharge and demands strict proof thereof.

80. At the time of the July 14, 2011 inspection, the Illinois EPA inspector collected samples. He collected a sample at the west end of the culvert where the livestock waste discharge was flowing toward the fresh water pond. The free discharge from the culvert was flowing at approximately one gallon per minute. The collected water was gray/brown in color, turbid and smelled like swine waste. He also collected a sample from the fresh water pond overflow pipe's discharge that released pond water into an unnamed tributary of Taylor Creek.

RESPONSE: Defendant generally admits the allegations contained in Paragraph 80, Count I as the IEPA inspector's observations, and affirmatively states that there was no discharge and that the water sample taken from the fresh water pond showed no excess pollutants from the facility.

81. At the time of the July 14, 2011 inspection, there were no freeboard markers in the two lagoon cells to aide in determining available freeboard. The Illinois EPA inspector estimated the primary cell had 14 inches of available freeboard and the secondary cell had 3 feet of available freeboard. Estimation of freeboard was made difficult by the tall vegetation present on the lagoon cell berms. Site manager Jeff Seabaugh told the Illinois EPA inspector that the freeboard observed in the secondary cell was obtained in late spring by land application to a field across the road. At the time of the July 14, 2011 inspection, the valve in the overflow pipe between the primary and secondary cell was open.

RESPONSE: Defendant generally admits the allegations contained in Paragraph 81, Count I, but denies that there was no freeboard marker.

82. At the time of the July 14, 2011 inspection, the Illinois EPA inspector observed that the facility water supply pump was at the southeast corner of the secondary lagoon cell and was running continuously at the time of an initial observation and also a half an hour later. This suggested a broken water line and/or loss of prime. A broken water line may be the source of additional liquid in the storage pit, causing it to discharge. On July 19, 2011, in a follow-up phone call with Jeff Seabaugh, Mr. Seabaugh told the inspector that there had been a break in a 3/4-inch water line and that this likely led to the loss of prime by the water supply pump. On July 21, 2011, during another follow-up phone call, Jeff Seabaugh told the Illinois EPA inspector that when present at the facility, facility personnel flushed building pits every 3 to 4 hours in an attempt to soften and remove old, solidified manure in the pits.

RESPONSE: Defendant generally admits the allegations contained in Paragraph 82, Count I as the IEPA inspector's understanding of the conversation that took place.

83. At the time of the July 14, 2011 inspection, the seven acre field on the facility property and some of the area to the south of Active Building 1 and the primary lagoon cell was planted in soybeans. At the time of the July 27, 2010 inspection, the facility reported its intent to sow this area in clover to allow liquid from the secondary cell to be irrigated onto the clover ground multiple times each summer after the clover is harvested to provide additional freeboard in the cell.

RESPONSE: Defendant generally admits the allegations contained in Paragraph 83, Count I, but denies any legal conclusions or consequences contained therein.

84. The Defendant has caused, allowed or threatened the discharge of contaminants to waters of the State so as to cause or tend to cause water pollution in Illinois or to violate the Board's regulations or standards through the discharge of livestock waste from its facility to Taylor Creek.

RESPONSE: Defendant denies the allegations contained in Paragraph 84, Count I.

85. The discharges of contaminants from the Defendant's facility have caused, threatened or allowed water pollution in that such discharges have likely rendered the waters of the State harmful or detrimental or injurious to public health, safety or welfare, or to agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish or other aquatic life and have likely created a nuisance.

RESPONSE: Defendant denies the allegations contained in Paragraph 85, Count I.

86. By causing, allowing or threatening the discharge of contaminants to waters of the State so as to cause or tend to cause water pollution in Illinois or to violate the Board's regulations or standards, the Defendant has violated Section 12(a) of the Act, 4151LCS 5/12(a).

RESPONSE: Defendant denies the allegations contained in Paragraph 86, Count I.

87. These violations have been committed willfully, knowingly and repeatedly, and have created a substantial danger to the environment or to the public health. These violations, and the discharges and other activity causing or contributing to the danger, will continue unabated unless and until enjoined by this Court.

RESPONSE: Defendant denies the allegations contained in Paragraph 87, Count I.

COUNT II WATER POLLUTION HAZARD

1-85. Plaintiff re-alleges and incorporates by reference herein paragraphs 1 through 85 of Count I as paragraphs 1 through 85 of this Count II.

RESPONSE: Defendant realleges and incorporates by reference herein the Answers to Paragraphs 1 through 85 of Count I as Answers to Paragraphs 1-85 of this Count II.

86. Section 12(d) of the Act, 415 ILCS 5/12(d), provides, in pertinent part, as follows: No person shall:

- d. Deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard;

RESPONSE: Defendant admits that Paragraph 86, Count II cites statutory language.

87. The Defendant has caused or allowed contaminants to be deposited upon the land in such place and manner as to create a water pollution hazard through its proximity to Taylor Creek.

RESPONSE: Defendant denies the allegations contained in Paragraph 87, Count II.

88. By depositing contaminants upon the land in such a place and manner as to create a water pollution hazard, the Defendant has violated Section 12(d) of the Act, 415 ILCS 5/12(d).

RESPONSE: Defendant denies the allegations contained in Paragraph 88, Count II.

89. These violations have been committed willfully, knowingly and repeatedly, and have created a substantial danger to the environment or to the public health. These violations, and the discharges and other activity causing or contributing to the danger, will continue unabated unless and until enjoined by this Court.

RESPONSE: Defendant denies the allegations contained in Paragraph 89, Count II.

97. Section 122.23(d) (1), 40 CFR 122.23(d)(1), provides, in pertinent part:

(d) *Who must seek coverage under an NPDES permit?*

- (1) *Permit requirement.* The owner or operator of a CAFO must seek coverage under an NPDES permit if the CAFO discharges.... Specifically, the CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit. If the Director has not made a general permit available to the CAFO, the CAFO owner or operator must submit an application for an individual permit to the Director.

RESPONSE: Defendant admits that Paragraph 97, Count III cites regulatory language.

98. By causing or allowing the discharge of a contaminant into waters of the State from a point source without an NPDES permit, the Defendant has violated Section 12(f) of the Act, 415 ILCS 5/12(f), and 35 III. Adm. Code 309.1 02(a).

RESPONSE: Defendant denies the allegations contained in Paragraph 98, Count III.

99. These violations have been committed willfully, knowingly and repeatedly, and have created a substantial danger to the environment or to the public health. These violations, and the discharges and other activity causing or contributing to the danger, will continue unabated unless and until enjoined by this Court.

RESPONSE: Defendant denies the allegations contained in Paragraph 99, Count III.

COUNT IV **OFFENSIVE CONDITIONS**

1-26. Plaintiff re-alleges and incorporates by reference herein paragraphs 1 through 26 of Count I as paragraphs 1 through 26 of this Count V.

RESPONSE: Defendant realleges and incorporates by reference herein the Answers to Paragraphs 1 through 26 of Count I as Answers to Paragraphs 1 through 26 of this Count IV.

27. Section 302.203 of the Board's water pollution regulations, 35 III. Adm. Code 302.203, states, in pertinent part:

Waters of the State shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity of other than natural origin. The allowed mixing provisions of Section 302.102 shall not be used to comply with the provisions of this Section.

* * *

RESPONSE: Defendant admits that Paragraph 27, Count IV cites regulatory language.

28. At the time of inspections conducted by the Illinois EPA on November 2, 18 and 23, 2009, discharges from Defendant's facility resulted in turbid, discolored and odor conditions in receiving waters of Taylor Creek.

RESPONSE: Defendant denies the allegations contained in Paragraph 28, Count IV and denies that there was unlawful discharge into the waters of the State.

29. By causing or allowing the discharge of contaminants that resulted in turbid, discolored and odor conditions in the waters of Taylor Creek, the Defendant violated Section 12(a) of the Act, 415 ILCS 5/12(a), and Section 302.203 of the Board's Water Pollution Regulations, 35 III. Adm. Code 302.203.

RESPONSE: Defendant denies the allegations and any legal conclusions contained in Paragraph 29, Count IV.

COUNT V
AGRICULTURAL RELATED POLLUTION

1-86. Plaintiff re-alleges and incorporates by reference herein paragraphs 1 through 86 of Count I as paragraphs 1 through 86 of this Count V.

RESPONSE: Defendant realleges and incorporates by reference herein the Answers to Paragraphs 1 through 86 of Count I as Answers to Paragraphs 1 through 86 of this Count V.

87. Section 501.403(a) of the Board's Agriculture Related Pollution Regulations, 35 III. Adm. Code 501.403(a), provides:

Section 501.403 Protection of Livestock Management Facilities and Livestock
Waste-Handling Facilities

- a) Existing livestock management facilities and livestock waste-handling facilities shall have adequate diversion dikes, walls or curbs that will prevent excessive outside surface waters from flowing through the animal feeding operation and will direct runoff to an appropriate disposal holding or storage area. The diversions are required on all aforementioned structures unless there is negligible outside surface water which can flow through the facility or the runoff is tributary to an acceptable disposal area or a livestock waste-handling facility. If inadequate diversions cause or threaten to cause a violation of the Act or applicable regulations, the Agency may require corrective measures.

RESPONSE: Defendant admits that Paragraph 87, Count V cites regulatory language.

88. Section 501.404(c)(1) and (2) of the Board's Agriculture Related Pollution Regulations, 35 III. Adm. Code 501.404(c)(1), (2), provides:

501.404 Handling and Storage of Livestock Waste

* * *

c) Livestock Waste-Holding Facilities

* * *

- 1) Liquid manure holding tanks shall be impermeable and capable of withstanding pressures and loadings to which such a tank may be subjected.
- 2) Holding ponds and lagoons shall be impermeable or so sealed as to prevent groundwater or surface water pollution.

RESPONSE: Defendant admits that Paragraph 88, Count V cites regulatory language.

89. Section 501.404(c)(3) of the Board's Agriculture Related Pollution Regulations, 35 III. Adm. Code 501.404(c)(3), provides:

Section 501.404 Handling and Storage of Livestock Waste

* * *

c) Livestock Waste-Holding Facilities

* * *

- 3) The contents of livestock waste-handling facilities shall be kept at levels such that there is adequate storage capacity so that an overflow does not occur except in the case of precipitation in excess of a 25-year, 24-hour storm.

RESPONSE: Defendant admits that Paragraph 89, Count V cites regulatory language.

90. Section 501.404(c)(4)(A) of the Board's Agriculture Related Pollution Regulations, 35 III. Adm. Code 501.404(c)(4)(A), provides:

Section 501.404 Handling and Storage of Livestock Waste

* * *

c) Livestock Waste-Holding Facilities

4) Liquid Livestock Waste

- A) Existing livestock management facilities which handle the waste in a liquid form shall have adequate storage capacity in a liquid manure-holding tank, lagoon, holding pond, or any combination thereof so as not to cause air or water pollution as defined in the Act or applicable regulations. If inadequate storage time causes or threatens to cause a violation of the Act or applicable regulations, the Agency may require that additional storage time be provided. In such cases, interim pollution prevention measures may be required by the Agency.

RESPONSE: Defendant admits that Paragraph 90, Count V cites regulatory language.

91. By failing to take adequate measures to divert clean water from entering livestock waste storage structures, the Defendant violated Section 12(a) of the Act and 35 III. Adm. Code 501.403(a).

RESPONSE: Defendant denies the allegations contained in Paragraph 91, Count V and any legal conclusions contained therein.

92. By failing to maintain building waste storage pits appropriately and adequately sealed to prevent seepages and discharges of livestock waste, the Defendant has violated Section 12(a) and (d) of the Act, 4151LCS 5/12(a), (d), and 35111. Adm. Code 501.404(c)(1) and (2).

RESPONSE: Defendant denies the allegations contained in Paragraph 92, Count V and any legal conclusions contained therein.

93. By failing to provide appropriate and adequate waste storage and maintain waste levels so as to prevent a discharge, the Defendant has violated Section 12(a) and (d) of the Act, 4151LCS 5/12(a), (d), 35111. Adm. Code 501.404(c)(3) and 35111. Adm. Code 501.404(c)(4)(A).

RESPONSE: Defendant denies the allegations contained in Paragraph 93, Count V and any legal conclusions contained therein.

94. These violations have been committed willfully, knowingly and repeatedly, and have created a substantial danger to the environment or to the public health. These violations, and the discharges and other activity causing or contributing to the danger, will continue unabated

unless and until enjoined by this Court.

RESPONSE: Defendant denies the allegations contained in Paragraph 94, Count V and any legal conclusions contained therein.

COUNT VI
AIR POLLUTION

1. This Count is brought on behalf of the People of the State of Illinois, by Lisa Madigan, Attorney General of the State of Illinois, on her own motion pursuant to Sections 42(d) and (e) of the Illinois Environmental Protection Act ("the Act"), 415 ILCS 5/42(d) and (e).

RESPONSE: Defendant admits the allegations contained in Paragraph 1, Count VI.

2-13. Plaintiff re-alleges and incorporates by reference herein paragraphs 2 through 13 of Count I as paragraphs 2 through 13 of this Count II.

RESPONSE: Defendant realleges and incorporates by reference herein the Answers to Paragraphs 2 through 13 of Count I as Answers to Paragraphs 2 through 13 of this Count VI.

14. Section 3.115 of the Act, 415 ILCS 5/3.115, provides the following definition: "AIR POLLUTION" is the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property.

RESPONSE: Defendant admits that Paragraph 14, Count VI cites statutory language.

15. Section 3.165 of the Act, 415 ILCS 5/3.165, provides the following definition: "CONTAMINANT" is any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source.

RESPONSE: Defendant admits that Paragraph 15, Count VI cites statutory language.

16. Section 9(a) of the Act, 415 ILCS 5/9(a), provides, in pertinent part, as follows: No person shall

- a) Cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under this Act; * * *

RESPONSE: Defendant admits that Paragraph 16, Count VI cites statutory language.

early due to the odors. On May 23, 2010, the odors were so strong indoors, the Clarks covered their noses and mouths with cloth inside the house. The Clarks have set up a basement bedroom that has an air filter. On May 23, 2010, the Clarks were forced to sleep in the basement due the odors in the rest of the home.

RESPONSE: Defendant is without sufficient knowledge to form a belief as to the truth or falsity of the allegations contained in Paragraph 83, Count VI and, as such, neither admits nor denies said allegations, but demands strict proof thereof.

84. In June of 2010, Joe and Megan Clark were impacted at their home by strong, offensive odors from the facility on 14 out of 30 days. On June 2, 2010, Joe Clark experienced headache, nausea, irritated eyes and gaging in response to the offensive odors from the facility. On June 20, 2010, Joe Clark and his employee had to jump start a car on the property during a time of offensive odors. The employee had to leave and go inside to get out of the odor. On that same date, Mr. Clark developed a headache and nausea in response to the odors that had penetrated the home despite the windows being closed and air filters in operation. On June 22, 2010, Megan Clark developed a headache, tearing eyes and vomited several times in response to offensive odors on the Clarks' property from the facility. On that date, Mr. Clark started to take Mrs. Clark to the local hospital's emergency room, but as they came into non-odorous air conditions away from the property, the symptoms dissipated. On June 24, 2010, the Clarks invited neighbors to a cook out at the Clarks' property. At 9: 15, the odors from the facility came up at the Clarks' property, causing the guests to leave.

RESPONSE: Defendant is without sufficient knowledge to form a belief as to the truth or falsity of the allegations contained in Paragraph 84, Count VI and, as such, neither admits nor denies said allegations, but demands strict proof thereof.

85. As of July 14, 2010, Joe and Megan Clark had been impacted at their home by strong, offensive odors from the facility on 7 days in the month of July. On July 2, 2010, at 1:10 P.M. the wind direction suddenly shifted from east to south east, resulting in strong offensive hog odors, both of dead hogs and hog waste, coming into the home. Mr. Clark literally ran through the house to close the windows. The Clarks had invited friends to their home for a July 3, 2010 Fourth of July party. The Clarks considered cancelling it, due to the threat of odors, but decided not to cancel. At the time of the guests arrival at the Clarks' home on July 3, 2010, dead hog and swine waste odors were strong at the Clarks' property. The party was confined to indoors. The Clarks requested that their guests provide written statements of the odor experienced at the home at the time of the party. Five of the guests provided written statements. Most all of the guests left earlier than they originally intended. On July 5, 2010, the Clarks experienced strong, offensive odors from the facility intermittently all day. They would start outdoor activities when the odor subsided, only to have to stop and go indoors a short period later. On July 11, 2010, the Clarks again experienced strong, offensive odors from the facility, intermittently. Ms. Clark had wanted to trim tree branches and garden in the evening, but could not due to the odor. On July 13, 2010, the Clarks experienced a very strong offensive odor from the facility at 11 p.m. On July 14, 201, the Clarks experienced very strong offensive odors from the facility, inside and outside of their home.

RESPONSE: Defendant is without sufficient knowledge to form a belief as to the truth or falsity of the allegations contained in Paragraph 85, Count VI and, as such, neither admits nor denies said allegations, but demands strict proof thereof.

86. The number of days impacted by odor per month by the Clarks at their home and business has increased in 2010. The Clarks have maintained a log documenting days upon which odors have caused them to alter their activities on their property since March 2009. For those months for which the Clarks generated documentation, from March 2009 through July 2010, they were impacted by odor on average 10 to 15 days per month. For the months of April through July, 2010, they were impacted on average 15 to 20 days per month.

RESPONSE: Defendant is without sufficient knowledge to form a belief as to the truth or falsity of the allegations contained in Paragraph 86, Count VI and, as such, neither admits nor denies said allegations, but demands strict proof thereof.

87. Robyn and Jim McClelland live directly north of Joe and Megan Clark. The McClellands indicate that they have lived at their current location since 1985. The facility site has been a hog operation since at least 1985. It went out of business at one point, and then was sold and put back into operation. The McClellands said historically the facility was never as odorous as it is now. They indicate that in the past the odor impacted their property in the evenings, however recently it has come up at no specific time during the day. The McClellands indicate the odors cause them to abandon outdoor activities and go inside, close windows, and keep the air conditioning on when they would not otherwise do so. Mr. McClelland indicates he and his wife are impacted at their property by unreasonably offensive odors coming from the facility 20 out of 30 days each month, year round.

RESPONSE: Defendant is without sufficient knowledge to form a belief as to the truth or falsity of the allegations contained in Paragraph 87, Count VI and, as such, neither admits nor denies said allegations, but demands strict proof thereof.

88. Becky McClelland owns and lives on adjacent property north of Robyn and Jim McClelland. She and her husband have lived on their current farm property for 20 years. Ms. McClelland indicates that the current operation at the subject facility seems to produce worse odor than previous operators. In March, April, May and June of 2010, they experienced offensive odors from the facility that unreasonably interfered with the use of their property on 6 to 9 occurrences per month. Ms. McClelland indicates that when the offensive odors from the facility are on the McClelland's property, they cannot remain outside and are prevented from undertaking outdoor activities. During odor episodes, they have retreated indoors, and despite running the air conditioner, the odors have penetrated the home. During the odor episodes, Ms. McClelland is prevented from hanging laundry outdoors due to the odor.

RESPONSE: Defendant is without sufficient knowledge to form a belief as to the truth or falsity of the allegations contained in Paragraph 88, Count VI and, as such, neither admits nor denies said allegations, but demands strict proof thereof.

89. On March 9, 2010, Mr. Clark submitted a complaint to the Illinois EPA indicating the odor at his home from the facility was as bad as it had been for a long time. A next closest

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

1. Plaintiff's claim that an NPDES permit is required for this facility is governed by federal law, as the NPDES permit is a federal permit, administered by the State of Illinois as a delegated state pursuant to such federal program. Specifically, Respondent is not obligated to seek or obtain an NPDES permit. There is no duty to apply for an NPDES permit unless the operation is actually discharging, which is not the case under the facts alleged here. Further, there is no liability for a failure to apply for an NPDES permit.

SECOND AFFIRMATIVE DEFENSE

2. Complainant has not alleged nor has there been any environmental harm or damage or pollution to our nation's or state's waters by reason of the allegations set forth in the Complaint.

THIRD AFFIRMATIVE DEFENSE

3. Counts I-V of Plaintiff's complaint are premised on allegations that a discharge has occurred, however, extensive testing has been done at the site by the Illinois Environmental Protection Agency and no discharge has occurred into any water of the State.

FOURTH AFFIRMATIVE DEFENSE

4. The Illinois Environmental Protection Agency did not express any odor concerns in the subject violation notices as required by 415 ILCS 5/31 before Plaintiff instituted a civil action thereon. As a result, proper notice and opportunity to enter a "compliance commitment agreement" was not provided to Defendant of any alleged air pollution violation and, accordingly Count VI must be dismissed.

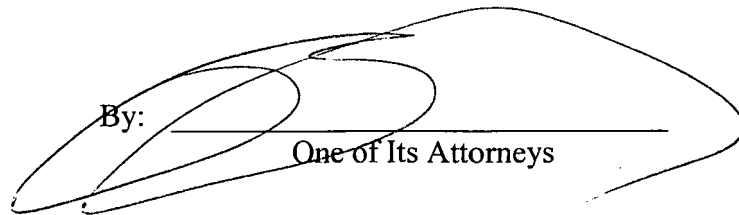
FIFTH AFFIRMATIVE DEFENSE

5. Count VI of Plaintiff's complaint asserts, in essence, a private nuisance claim under the guise of the Act. Such action is within the exclusive jurisdiction of the Illinois Pollution Control Board, as the general welfare of the public is not at issue here.

WHEREFORE, Respondent, Fragrant 40, LLC, respectfully requests that this Court enter an order striking and dismissing the Complaint and awarding Fragrant 40, LLC its costs and such other relief as this Court deems just and proper.

Respectfully submitted,

FRAGRANT 40, LLC, Defendant,

By:  _____
One of Its Attorneys

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